LIBRARY
SUPREME COURT, U. S.

FILED
AUG 2 1973

In the Supreme Court of the United States

No. 73-226

WILLIAM P. STARK and LERA H. STARK,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ELMER B. HODGES
RICHARD H. BROWN
1000 Bryant Building
1102 Grand Avenue
Kansas City, Missouri 64106
Attorney for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

INDEX

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Statutes and Regulations Involved 3
Statement of the Case 6
Reasons for Granting Writ 9
Conclusion 14
Appendix—
A (Opinion of the Court of Appeals) A1
B (Opinion and Judgments of John W. Oliver, District Judge A4
C (Petition for Rehearing) A15
D (Order Denying Rehearing) A23

Citations

CASES

Ithaca Trust Co. v. *U. S.*, 279 U.S. 151 (1929) 9, 10, 12
Merchants National Bank of Topeka v. *U. S.*, ... F. Supp. ....., No. T-5098 (D.Kan. Mar. 7, 1973) 11
Rosen v. *Commissioner*, 397 F.2d 245 (4th Cir. 1968) 12, 13
Simpson v. *U. S.*, 252 U.S. 547 (1920) 9

STATUTES AND REGULATIONS

Internal Revenue Code of 1954:
26 U.S.C. §1346(a)(1) 6
§2503(b) 3, 5, 8, 9
§7805 ..... 2, 3, 8
28 U.S.C. §1254(1) 2
Treas. Reg. §25.2512-5(a)(2) 4
Treas. Reg. §25.2512-5(c) 3, 4
Treas. Reg. §25.2512-5(f) 2, 6

In the Supreme Court of the United States

No. .....

WILLIAM P. STARK and LERA H. STARK,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners William P. Stark and Lera H. Stark respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered upon their joint appeals on April 12, 1973, affirming the judgments against them by the United States District Court for the Western District of Missouri in their actions against the United States for refund of federal gift taxes.

(A) OPINIONS BELOW

Memorandum Opinion and Order of John W. Oliver, United States District Judge filed August 2, 1972, reported in 345 F.Supp. 1263, and set out in the Appendix as Appendix B, p. A6.

Opinion of the United States Court of Appeals for the Eighth Circuit in these cases reported in 477 F.2d 131, and set out in the Appendix as Appendix A, p. A1.

The joint Petition for Rehearing of petitioners was timely filed and is set out in the Appendix as Appendix C, p. A15.

(B) STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(1) The opinion and judgment of the Court of Appeals for the Eighth Circuit sought to be reviewed were made and entered on April 12, 1973.

(2) The order denying petitioners' joint petition for rehearing was entered on May 9, 1973. This petition for certiorari is filed less than ninety days from the time said order was entered.

(3) The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1948).

(C) QUESTIONS PRESENTED FOR REVIEW

1. Is the present value of a life estate (the right of a person for his life to receive the income of certain trust property) ascertainable by applying to the value of the trust property the actuarial table prescribed by the Treasury Department in Treas. Reg. §25.2512-5(c) and (f) pursuant to 26 U.S.C. §7805 (1970) as contended by petitioners; or would the use of actuarial tables in the valuation of life estates contravene the intention of Congress in that such application of the regulation "would

substitute the use of a formula for the Congressionally required proof of value" and therefore be invalid, as held by the District Court (A13) a proposition adopted by the Court of Appeals in affirming the decision of the District Court on the basis of the opinion of the District Judge?

2. Is the value of a life estate which is ascertainable by the use of the Treasury Department's actuarial tables for the purpose of imposition of gift taxes not susceptible of valuation in the same manner when valuing the life estate in order to determine the donor's right to the $3,000.00 annual exclusion for gifts of present interest under Section 2503(b) of the Internal Revenue Code?

3. Are the regulations of the Treasury Department, promulgated under authority of 26 U.S.C. §7805 (1970), to be applied according to their unambiguous terms when they state that the actuarial tables are to apply in determining the value of a life estate as in Treas. Reg. §25.2512-5 (c), or is uncertainty to be the rule with the Treasury Department insisting on the use of the actuarial tables when such use favors the government but denying such use if such use would benefit the taxpayer?

(D) STATUTES AND REGULATIONS INVOLVED

The statutory authority for the issuance of the gift tax regulations in question is found in 26 U.S.C. §7805(a) (1970) reading as follows:

> (a) *Authorization.* Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary or his delegate shall prescribe all needful rules and regulations for the enforcement of this title, ...

Pursuant to this authority the Treasury Department has issued the gift tax regulations of which the pertinent parts of Treas. Reg. §25.2512-5 are as follows:

> (a) (2) The present value of an annuity, life estate, remainder or reversion determined under this section which is dependent on the continuation or termination of the life of one person is computed by the use of Table I in paragraph (f) of this section. . . .
>
> (c) *Life estates and terms for years.* If the interest to be valued is the right of a person for his life, . . . to receive the income of certain property or to use nonincome-producing property, the value of the interest is the value of the property multiplied by the figure in column 3 of Table I opposite the number of years nearest to the actual age of the measuring life. . . . The application of this paragraph may be illustrated by the following example:
>
> *Example.* The donor, who during his life is entitled to receive the income from property worth $50,000, makes a gift of such interest. The donor is 31 years old on the date of the gift. The value of the gift is $35,534 ($50,000 x 0.71068).
>
> (f) the following tables shall be used in the application of the provisions of this section:

TABLE I

(Table, Single Life, 3-1/2 percent, showing the present worth of an annuity, of a life interest, and of a remainder interest)

Age	Life Estate
2	.87122
3	.86886
4	.86582
5	.86237
6	.85864
7	.85466
8	.85044
9	.84600
10	.84135

The statutory authority for the $3,000 annual exclusion for gifts of present interests is found in 26 U.S.C. §2503(b) (1970), which reads in pertinent part as follows:

> (b) *Exclusions from gifts.* . . [I]n the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1971 and subsequent calendar years, $3,000 of such gifts to such person during all preceding calendar quarters of the calendar year shall not, for purposes of subsection (a), be included in the total amount of gifts made during such quarter.

(E) STATEMENT OF THE CASE

The issue in the cases sought to be reviewed is whether the values of life estates in trust income can be ascertained by use of the actuarial tables prescribed by Treas. Reg. §25.2512-5(f) as contended by petitioners, or whether such values cannot be so ascertained and, in fact, are not susceptible of ascertainment as contended by the Commissioner.

On audit of gift tax returns of petitioners in which they claimed the $3,000 annual exclusion for gifts of life income in trusts created by them, such exclusions were denied. Petitioners had computed the value of each life estate by applying to the gift property the actuarial factors prescribed by Treas. Reg. §25.2512-5(f). The exclusions so claimed were denied on the ground that the values of the life estates were not so ascertainable, and deficiencies in gift taxes were assessed and paid. Timely claims for refund of these taxes having been disallowed, petitioners brought separate actions in the District Court pursuant to 26 U.S.C. §1346(a) (1) (1970) to recover such taxes. The issues in the cases brought by the two petitioners being identical, the cases were consolidated for trial in the District Court. The gifts involved were irrevocable gifts of income for life in trusts created by petitioner William P. Stark under three trust agreements, each of which granted to a separate grandchild of donor all income from the trust as long as said child should live, the ages of the grandchildren at the time of creation of the trusts being 2, 6 and 8 years respectively. There were no provisions for accumulation of income and all income of the trusts was required to be paid to the life beneficiaries currently beginning with the time of creation of the trust.

The District Court denied the refunds claimed on the ground that the actuarial tables could not be used in determining the values of the life estates. Apparently the Court based its conclusion in large part upon an erroneous reading of Section 2503(b) of the Internal Revenue Code of 1954 as containing a specific statutory condition permitting the annual $3,000 exclusion on a proviso that the gift "is one susceptible of valuation." From this assumed, but actually nonexistent proviso, the Court rejected the use of the actuarial tables on the ground that such use would contravene the erroneously assumed intention of Congress that the valuation of a life estate must be determined in each case without reference to actuarial tables. The Court said:

> We think it obvious that the Congress did not authorize the Commissioner, by the promulgation of a regulation, to eliminate one of the two requirements that the parties agree a taxpayer must establish in order to be eligible to claim a gift tax exclusion. We are convinced that Congress intended that if proof of value of a particular gift could not be made in regard to the gift of a present, as distinguished from a future, interest, all taxpayers so situated simply would not be able to claim an exclusion. We reject the basic assumption implicit in plaintiffs' argument that all gifts of life estates are in fact susceptible of valuation. 345 F.Supp. at 1265 (A11).

Responding to plaintiffs' argument that the value of life estate in trust income to be enjoyed by a young child cannot be determined without reference to actuarial tables, the Court stated:

> We conclude that the taxpayers in this case cannot demand that the Commissioner use a formula which the Congress did not provide. This Court may not

read a regulation in a manner which would substitute the use of a formula for the Congressionally required proof of value. 345 F.Supp. at 1266 (A13).

In their appeal to the Court of Appeals, petitioners pointed out that Section 2503(b) did not, as erroneously assumed by the District Court, impose a statutory condition that to qualify for the exclusion the gift must be "in fact susceptible of valuation", and that the District Court was therefore clearly in error in denying use of the actuarial tables on the ground that their use would contravene a "Congressionally required proof of value".

The opinion of the Court of Appeals recognized in the footnote to its opinion that the requirement of ascertainable value was not contained in Section 2503(b) but was a requirement "judicially imposed". Having so recognized that the basic premise of the District Court decision was in error, the Court of Appeals affirmed the decision on the basis of the District Court opinion.

In their appeal to the Court of Appeals, petitioners urged that the regulation requiring in specific terms that the value of a life estate, whether in income or in nonincome-producing property be determined by use of the actuarial tables, was promulgated under authority of 26 U.S.C. §7805(a) (1970), that the regulation had been in effect in substantially the same form for more than thirty years and had acquired the force and effect of law, and that the petitioners were entitled to rely on its unambiguous language. The opinion of the Court of Appeals took no notice of this argument.

Petitioners further pointed out that the gifts of these life estates in income had been made the basis of the imposition of gift taxes against the petitioners, that their value necessarily would have to be ascertained by the use

of actuarial tables, and that it was unreasonable to hold that a life estate which would be valued according to actuarial tables for the purpose of imposition of the gift tax could not be so valued for the purpose of determining its value for the purpose of applying the annual exclusion under Section 2503(b). The opinion of the Court of Appeals took no notice of this argument.

A timely petition for rehearing was denied without opinion.

(F) REASONS FOR GRANTING THE WRIT

1. The opinion of the District Court that the value of trust income to be received during the life of a young child is not ascertainable by the use of actuarial tables, which opinion was approved by the Court of Appeals, is in direct conflict with the decisions of this Court in *Simpson* v. *U. S.*, 252 U.S. 547 (1920) and *Ithaca Trust Co.* v. *U. S.*, 279 U.S. 151 (1929). These decisions specifically approve the use of actuarial tables for the purpose of determining the values of life estates. The contrary holding in the courts below creates a state of confusion and uncertainty in the administration of both the federal estate and the federal gift tax laws. In *Simpson* this Court upheld the use of mortality tables with a 4 percent interest factor in determining the value of life interests under the Spanish War Revenue Act, stating that it was much too late to successfully assail a method which had been so generally applied. In *Ithaca Trust*, this Court approved the use of mortality tables in computing the value of a remainder given to charitable corporations upon the death of the life tenant; and held that the circumstances of the life tenant's death within the year allowed for filing the estate tax return should not prevail over the actuarial tables.

Explaining its rejection of the known fact of the actual six month life span of the widow in favor of use of actuarial tables which produced the widow's longer theoretical life expectancy, this Court in *Ithaca* said:

> The first impression is that it is absurd to resort to statistical probabilities when you know the fact. But this is due to inaccurate thinking. The estate so far as may be is settled as of the date of the testator's death. [citations omitted] The tax is on the act of the testator, not on the receipt of property by the legatees. [citations omitted] Therefore the value of the thing to be taxed (the life estate) must be estimated as of the time when the act is done. But the value of property at a given time depends upon the relative intensity of the social desire for it at that time, expressed in the money that it would bring in the market. [citations omitted] Like all values, as the word is used by the law, it depends largely on more or less certain prophecies of the future; and the value is no less real at that time if later the prophecy turns out false than when it comes out true. [citations omitted] Tempting as it is to correct uncertain probabilities by the now certain fact, we are of opinion that it cannot be done, but that the value of the wife's life interest must be estimated by the mortality tables. 279 U.S. at 155 (parenthetical matter supplied).

The opinions of the courts below directly challenge the use of actuarial tables in determining the value of life estates, not only in this particular case, but in every case. This is apparent from the following quotation from the opinion of the District Court:

> The implicit major premise of plaintiffs' argument is that Congress contemplated that some value must

> be assigned to every gift of life income in common stock and that if such value cannot be reasonably ascertained from the factual circumstances of a particular case, all donors of such gifts are nevertheless to be considered entitled to establish one of the two prerequisites for an exclusion by a simple reference to the mortality tables. . . . Indeed, in their reply brief the plaintiffs argue that "it is because of the impossibility of determining 'reasonable ascertainable values' of a life estate in trust income that the Commissioner, under statutory authority, has promulgated these actuarial tables. . . ." 345 F.Supp. at 1265 (A10-11).

to which the District Court responded:

> We reject the basic assumption implicit in plaintiffs' argument that all gifts of life estates are in fact susceptible of valuation. 345 F.Supp. at 1265 (A11).

If these decisions are allowed to stand, the values of every life estate will be a matter to be litigated in an attempt to forecast interest rates, health of the life tenant, investment policies of the trustee and other unpredictable factors.

As pointed out in the recent case of *Merchants National Bank of Topeka* v. *U. S.*, ... F.Supp. ....., No. T-5098 (D. Kan. Mar. 7, 1973):

> The regulation quite specifically provides that the actuarial tables shall apply in determining the value of a life estate. If the Court were to adopt the IRS position [that the value of a life estate is a question of fact to be determined by IRS in each individual case by using the tables and other facts and circumstances bearing upon value], the proverbial can of worms would be opened, and in virtually every case,

> either IRS, the taxpayer or both would argue the inapplicability of the tables to their particular case. The Court assumes that one of the purposes of the regulation was to do away with uncertainty and speculation in putting a value upon such things as life estates, remainders and reversionary interests. If defendant's position was accepted, the regulation would become meaningless, except that the table would be some evidence. However, uncertainty as to value would be the rule.

It is submitted that the prevention of such a state of confusion and uncertainty is of the greatest importance and requires the exercise of this Court's power of supervision in reaffirmation of the doctrine announced in *Ithaca Trust Co.* v. *U. S.*, *supra*, that the ascertainment of values of life estates by the use of actuarial tables is not only permissible but is in fact, the only feasible method of determining such values.

2. The opinion of the Court of Appeals of the Eighth Circuit in this case is in direct conflict with the decision of the Court of Appeals for the Fourth Circuit in *Rosen* v. *Commissioner*, 397 F.2d 245 (1968). In that case, as in this, the Commissioner sought to disallow the $3,000 annual exclusion to gifts of life income in trusts composed of stock which, at the time, was not paying any dividends. In that case, as in this, the Commissioner argued that the values of the gifts of life income were not ascertainable because of absence of a consistent dividend pattern. The Court rejected the argument that actuarial tables could not be used in valuing the life estate. It said:

> Contrary to the government's contention, we think it unreasonably unrealistic to deny value to the present interest concededly possessed by the donees. Only

> the most unsophisticated investor, certainly not the purchaser of growth stocks, looks to currently established dividend yield to value his *present* interest. Although it is hope for the future that accounts for the investment irony of *present* value inversely proportioned to yield, such hopes are not always long postponed in an era of conglomerate merger. To deny to the taxpayers here the use of the tables is to treat, for tax purposes, the donated income interest as having no value at all. 397 F.2d at 247.
>
> The government entertains two inconsistent positions—on one hand conceding that a valuable right was donated and on the other contending that for tax purposes the right is valueless. 397 F.2d at 247.
>
> There is, of course, no justification for a double standard. Neutral principles forbid that the Commissioner be allowed to apply the tables where to do so produces greater revenue and to refuse application where it does not. It is conceded that a valuable right to receive income has been donated. The right is incapable of precise valuation by reference to a specific yield. Absent extraordinary circumstances, and without regard to the amount of revenue produced, we think the taxpayers are entitled to resort to the actuary tables promulgated by the Commissioner himself. . . . "The United States is in business with enough different taxpayers so that the law of averages has ample opportunity to work." [Citation omitted] 397 F.2d at 248.

The decision of the Court of Appeals in the case at bar asserts without further comment that the case of *Rosen* v. *Commissioner*, "is distinguishable". The District Court attempted to distinguish that case from the case at bar on the ground that Judge Craven stated in the *Rosen* case that,

"It is important to note that it has not been suggested to us that the 'income interest' was valueless." (A13). If by that comment the District Judge meant to imply that the life estates in the case at bar were valueless, he was obviously mistaken. Regardless of the amount of current income which might be produced at any particular time by the corpus of the trusts in the case at bar, the value of a right to income during the life expectancy of beneficiaries who were from 2 to 10 years old can certainly not be considered as "valueless". Either through sale and reinvestment of the trust corpus or the resumption of dividend payments, these life estates certainly have a value. That value can be ascertainable only by use of actuarial tables and, as pointed out in the *Rosen* decision, to deny the use of actuarial tables in determining such value is to hold in effect that the life interest is valueless.

CONCLUSION

A question of substantial importance is presented by the otherwise eminently forgettable opinion of the Eighth Circuit holding that the command of a validly issued regulation having the force of law, though binding upon taxpayers, is not binding upon the Commissioner. Evenhanded administration of the tax laws, and resolution of a clear conflict with the Fourth Circuit, require review by this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

ELMER B. HODGES
RICHARD H. BROWN
1000 Bryant Building
1102 Grand Avenue
Kansas City, Missouri 64106
Attorney for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1579

Lera H. Stark,
Appellant,
v.
United States of America,
Appellee.

No. 72-1580

William P. Stark,
Appellant,
v.
United States of America,
Appellee.

Appeal from the United States District Court for the Western District of Missouri.

Submitted: February 16, 1973.
Filed: April 12, 1973.

Before LAY and BRIGHT, Circuit Judges, and NICHOL, District Judge.*

PER CURIAM.

We are presented with the question whether, in order to claim the $3,000 gift tax exclusion pursuant to 26 U.S.C.

---

*Sitting by designation.

§2503(b), a taxpayer might satisfy his burden of proving that an income interest in a trust has "ascertainable value,"[1] by reference to the actuarial tables found in Treas. Reg., 26 CFR §25.2512-5(c).

The taxpayer made gifts of the stock of a closely held corporation to three trusts, for the benefit of each of the taxpayers' three minor grandchildren. The beneficiaries were to receive the net income from the trusts until each reached the age of 30, at which time the beneficiaries could terminate the trusts and receive the trust corpus. The parties agree that the gifts of the shares of stock to the trusts constitute gifts of future interests and thus are not subject to the annual exclusion, but the taxpayers claim that their making the gifts of the income from the stock entitles each to the annual exclusion of $3,000 for each beneficiary of the trusts pursuant to §2503(b). The taxpayers based their asserted right to the exclusions on the argument that the right of the beneficiaries to the net income of the trusts was a present interest and was capable of valuation by the use of the actuarial tables prepared by the Commissioner in Treas. Reg. §25.2512-5(c). The Government argued that since the

---

1. In order for a gift to be subject to § 2503(b) exclusion, two requirements must be satisfied. First, the gift must not be a gift of a future interest, as that term is defined in Treas. Reg., 26 CFR § 25.2503-3(a). Second, the gift must have an "ascertainable value." This requirement of ascertainable value is one judicially imposed. *See, e.g., Van Den Wymelenberg* v. *United States*, 397 F.2d 443 (7th Cir.), *cert. denied*, 393 U.S. 953 (1968); *Fischer* v. *Comm'r*, 228 F.2d 574 (3d Cir. 1961); *Funkhouser's Trusts* v. *Comm'r*, 275 F.2d 245 (4th Cir.), *cert denied*, 363 U.S. 804 (1960); *Mercantile-Safe Deposit and Trust Co.* v. *United States*, 311 F. Supp. 670 (D. Md. 1970); *Pettus* v. *Comm'r*, 54 T.C. 112 (1970); *Morgan* v. *Comm'r*, 42 T.C. 1080 (1964); *aff'd per curiam*, 353 F.2d 209 (4th Cir. 1965), *cert. denied*, 384 U.S. 918 (1966); *Hamm* v. *Comm'r*, 20 CCH Tax Ct. Mem. 1814, Dec. 25, 193(M) (1961); *aff'd on other grounds*, 325 F.2d 974 (8th Cir. 1963); *Newmaker* v. *Comm'r*, 12 Tax Ct. Mem. 232, Dec. 19, 499(M) (1953).

stock of the corporation had never been publicly traded and since no dividends had been paid on the stock since 1950, the taxpayers had not established an "ascertainable value" for the right to the income from the stock held in trust.

The undisputed evidence indicates, and the district court specifically found, that there was little possibility that any income would be forthcoming to the beneficiaries from the trusts in question. Under these circumstances, we hold that the income interest had no ascertainable value, and that the taxpayers cannot be allowed to assert a value for the income interest simply by using the actuarial tables of Treas. Reg. §25.2512-5(c). *Van Den Wymelenberg, supra,* 397 F.2d at 443; *Fischer, supra,* 288 F.2d at 574; *Morgan, supra,* 42 T.C. at 1080; *Hamm, supra,* 20 CCH Tax Ct. Mem. at 1814; *Newmaker, supra,* 12 CCH Tax Ct. Mem. at 232. *See Mercantile-Safe, supra,* 311 F.Supp. at 670; *Pettus, supra,* 54 T.C. at 112. *Rosen* v. *Comm'r,* 397 F.2d 245 (4th Cir. 1968), cited and relied upon by appellant, is distinguishable. The district court opinion recites the facts in detail and demonstrates the correctness of the Government's position in this case. We, therefore, affirm on the basis of that opinion. *Stark* v. *United States,* 345 F.Supp. 1263 (W.D. Mo. 1972).

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES DISTRICT COURT

For The
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action File No. 19212-1

WILLIAM P. STARK,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Judgment

(Filed August 2, 1972)

This action came on for trial (hearing) before the Court, Honorable John W. Oliver, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered, It is Ordered and Adjudged that the plaintiff, William P. Stark, take nothing by reason of his Complaint herein but that the defendant, United States of America, have and recover of the plaintiff its costs herein laid out and expended and have execution therefor.

Dated at Kansas City, Missouri, this 2nd day of August, 1972.

/s/ J. C. Truman
Clerk of Court

UNITED STATES DISTRICT COURT
For The
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action File No. 19211-1

LERA H. STARK,
Plaintiff

vs.

UNITED STATES OF AMERICA,
Defendant.

Judgment

(Filed August 2, 1972)

This action came on for trial (hearing) before the Court, Honorable John W. Oliver, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered, It is Ordered and Adjudged the plaintiff Lera H. Stark, take nothing by reason of her Complaint herein but that the defendant, United States of America, have and recover of the plaintiff its costs herein laid out and expended and have execution therefor.

Dated at Kansas City, Missouri, this 2nd day of August, 1972.

/s/ J. C. Truman
Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 19211-1
LERA H. STARK,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant;

and

No. 19212-1
WILLIAM P. STARK,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Memorandum and Order

(Filed August 2, 1972)

I.

These actions for refund of gift taxes and interest are before the Court on a fully stipulated record. The facts are stipulated by the parties in Standard Pretrial Order No. 2 and in the Stipulation of Uncontroverted Facts. Accordingly we make the following findings:

1. The jurisdictional facts contained in Part II of this Pretrial Order are incorporated herein.

2. On or about November 1, 1962, plaintiff William P. Stark, Sr., executed three separate but identical trust

agreements naming his son, William P. Stark, Jr., as "Trustee." Each trust agreement differs only as to the name of the "primary beneficiary," each of whom was a grandchild of William P. Stark, Sr., and a child of William P. Stark, Jr.

3. The trusts were set up in the following names to reflect the name of each "primary beneficiary:"

Name	Age at Creation of Trust
Krishma Marie Stark	2
Rahm Joseph Stark	6
William P. Stark, III	8

4. During the calendar years 1962, 1963, and 1964 transfers were made to each of the three trusts of shares of stock in the Stark Lumber Company, (hereinafter to be referred to as the "Company"), a closely-held family corporation, with the majority of the stock being held by William P. Stark, Sr. Since 1960 William P. Stark, Sr., has been Chairman of the Board and William P. Stark, Jr., has been President of the Company.

5. The Company was incorporated on or about March 23, 1946. Its stock has never been publicly traded nor offered for sale to the public. There have been no distributions of dividends by the Company (whether in cash, property, obligations or stock) since 1950.

6. During the calendar years 1962 and 1963 gifts of seven (7) shares of the Company's common stock were made to each of the three trusts by plaintiff William P. Stark, Sr., (plaintiff Lera H. Stark, consented to split the gifts with her husband during each of the calendar years 1962, 1963, and 1964) During the calendar year 1964 gifts

of 60 shares (after a ten-for-one stock split) of common stock of the Company were made to each of the trusts by plaintiff William P. Stark, Sr., with consents by plaintiff Lera H. Stark.

7. The Company's financial statements reflect the following earnings per share during the periods in question:

Calendar Year	Earnings Per Share
1962	$18.83
1963	3.59*
1964	7.66*

*The earnings figures indicated above for the calendar years 1963 and 1964 have been adjusted for a ten-for-one stock split.

8. In computing their taxable gifts to the three trusts during the periods in question the plaintiffs excluded the "present value of the right" of the beneficiaries to receive income from the trust property. Consequently, the plaintiffs valued said "right" by applying the table provided in Section 25.2512-5(c) of the Treasury Regulations on Gift Tax.

9. The annual exclusions taken by the plaintiffs were disallowed by the Internal Revenue Service.

The parties have also agreed that the issues of law to be determined are, specifically,:

1. Whether the plaintiffs by transferring in trust for the benefit of their three grandchildren a life interest in a closely-held stock with a record of non-issuance of dividends made gifts of a present interest (as contended by the plaintiffs) or of a future interest (as contended by the defendant).

2. If the Court determines that the donees' interests in the trust were present interests, were said interests susceptible of valuation at the time the gifts were made?

II.

Section 2503 (b) [Internal Revenue Code, 1954] permits an annual donee exclusion of the first $3,000 of gifts to any person during a calendar year provided that: (1) the gift is not one of a 'future interest,' and (2) is one susceptible of valuation. In order for the taxpayer to prevail, he must carry the burden of establishing both that the gift is not one of a "future interest" and that the gift is in fact susceptible of valuation.

We may assume, without deciding, that the gifts are not gifts of a future interest. In light of our conclusion that the taxpayers have not carried the burden of establishing that the gifts, regardless of how they may be defined, are in fact susceptible of valuation under Treasury Regulation § 25.2512-5(c), the defendant must prevail.

III.

A taxpayer claiming an exclusion must assume the burden of showing that his claim is within that exclusion. Under familiar principles, a presumption of correctness attaches to a determination of the Commissioner. *Commissioner* v. *Disston,* 325 U.S. 442, 449 (1945); *New Colonial Co.* v. *Helvering,* 292 U.S. 435, 440 (1934); *Hamm* v. *Commissioner,* (8th Cir., 1963) 325 P. 2d 934, 937; *Fischer* v. *Commissioner,* (3rd Cir., 1961) 288 F. 2d 574, 576; and *Kniep* v. *Commissioner,* (8th Cir., 1949) 172 F. 2d 755, 758.

Commissioner v. *Disston, supra,* turned on the question of whether the gift was of a present or a future interest.

Disston relied heavily upon *Fondren* v. *Commissioner*, 324 U.S. 18 (1945), which dealt with the same question. Both cases, however, made clear that it is necessary to consider the terms of a particular trust and the circumstances of each particular case in determining whether the taxpayer has carried the burden of establishing his right to an exclusion.

Plaintiffs recognize that the property given to the three trusts consisted solely of shares of capital stock of W. P. Stark Lumber Company, Inc., which paid individends during the period from 1946 to 1950, but none thereafter. The taxpayers' claims to exclusion rested upon their dual contention "that these gifts of life income were gifts of present interests and that such interests should be valued according to the tables promulgated in Reg. § 25.2512-5 (c)." Plaintiffs concede that the value of a gift of life income in stock can not be determined from the dividend history of that stock. Indeed, they state that "any assumption that income to be received during the lives of children from 2 to 10 years of age can be so prophesied is obviously absurd." [Pl. Br., p. 13]. They argue, however, "since it is impossible accurately to value life estates in income on the basis of known facts, the only fair method of determining such values is by the use of mortality tables and an assumed rate of interest." [Pl. Br., p. 14]. Plaintiffs argue "there is no other reasonable way to determine the values of such life estates" [Pl. Br., p. 15].

The implicit major premise of plaintiffs' argument is that Congress contemplated that some value must be assigned to every gift of life income in common stock and that if such value can not be reasonably ascertained from the factual circumstances of a particular case, all donors of such gifts are nevertheless to be considered entitled to establish one of the two prerequisites for an exclusion by a

simple reference to the mortality tables. Plaintiffs argue that this Court should not place "its stamp of approval on . . . the contention of the defendant that the values of the life estates are unascertainable . . ." [Pl. Br., p. 19]. Indeed, in their reply brief the plaintiffs argue that "it is because of the impossibility of determining 'reasonable ascertainable values' of a life estate in trust income that the Commissioner, under statutory authority, has promulgated these actuarial tables . . ." (Pl. Reply Brief, p. 3).

We think it obvious that the Congress did not authorize the Commissioner, by the promulgation of a regulation, to eliminate one of the two requirements that the parties agree a taxpayer must establish in order to be eligible to claim a gift tax exclusion. We are convinced that Congress intended that if proof of value of a particular gift could not be made in regard to the gift of a present, as distinguished from a future, interest, all taxpayers so situated simply would not be able to claim an exclusion. We reject the basic assumption implicit in plaintiffs' argument that all gifts of life estates are in fact susceptible of valuation.

Fischer v. *Commissioner, supra,* involved a case in which the government conceded that the "rights of Fischer's three daughters to receive the income from the trust were gifts of present interests." The government argued in that case, as it does in this, that the taxpayer was not entitled to an exclusion because their value "cannot be determined with reasonable certainty." That court concluded that "a gift of a present interest has not qualified for an annual exclusion where the value of the interest was not reasonably certain." We agree with *Fischer* and conclude that the principles there stated are applicable to this case.

Van Den Wymelenberg v. *United States,* (7th Cir., 1968) 397 F. 2d 443, cert. den. 393 U.S. 953, involved an-

other case in which the government conceded that the gifts were gifts of a present interest but contended that "they are not subject to the exclusion because their value was not ascertainable at the time the trust was created." That court followed *Fischer* and rejected the taxpayer's argument that the best evidence available to show the value of the income interests was the actual experience of the trust which, in that particular case, apparently showed a consistency in the amounts of income yielded and distributed each year. In rejecting that argument, the Court held that "if the value is not ascertainable then [at the time the gift is made], subsequent experience cannot render it so in retrospect."

In *Elise McK. Morgan*, 42 T.C. 1080 (1964), affirmed on the opinion of the Tax Court (4th Cir., 1965) 353 F. 2d 209, the taxpayers contended, as do the taxpayers in this case, that "the value of the income interest is calculatable by use of the tables provided in the applicable regulation." The Tax Court, we believe properly, rejected that argument and held that "where the property may yield no income at all or if the income is definitely determinable by other means, the tables are not applicable." *Hamm* v. *Commissioners, supra,* was cited by the Tax Court in support of that principle. While we agree with the Third Circuit and the Tax Court's conclusion in *Elise McK. Morgan,* we have some doubt about whether *Hamm* v. *C.I.R.* fully supports the sentence we have quoted from the Tax Court's opinion. We agree, of course, that the implications of now Mr. Justice Blackmun's opinion in *Hamm* are consistent with what the Tax Court held. And specifically, we think the language of that opinion which states that "the taxpayer's argument here comes down to a demand for a formula" is particularly apropos.

That is what taxpayers' argument in this case comes down to. We conclude that the taxpayers in this case can not demand that the Commissioner use a formula which the Congress did not provide. This Court may not read a regulation in a manner which would substitute the use of a formula for the Congressionally required proof of value.

The taxpayers rely heavily upon *Rosen* v. *Commissioner*, (4th Cir., 1968) 397 F. 2d 245. The distinction between *Rosen* and this case was recognized by Judge Craven when he stated in that case that "It is important to note that it has not been suggested to us that the 'income interest' was valueless." [Id. at 247].

Certainly, the Fourth Circuit did not intimate that it intended by its decision in *Rosen* to overrule what it had earlier decided in *Elise McK. Morgan*, in which it affirmed the Tax Court on its opinion to which we have earlier made reference. We recognize, of course, that *Rosen* did state that "we think the taxpayers are entitled to resort to the actuary tables promulgated by the Commissioner himself." We are not convinced that *Hipp* v. *United States*, (W.D. S.C., 1962) 215 F. Supp. 222, which *Rosen* cited to support that proposition, can be said to support such a broad statement of law. *Hipp* did note with apparent approval the Tax Court's opinion in *Hamm* (later affirmed by the Eighth Circuit, as above noted), but distinguished the factual situations presented in *Hamm* and *Hipp*. That court quoted with apparent approval the Tax Court's conclusion that under the particular circumstances of that case it was not proper to utilize the tables, by stating that "In the *Hamm* case, the circumstances affecting the Corporation, United, made it unlikely that there would be any payment of dividends at all to the trusts." In regard to the factual circumstances of *Hipp*, the court stated

"Here, there is every reason to believe that the dividends from Liberty Life stock will be available to charity."

If, as we have indicated, we are not correct in suggesting that both *Rosen* and *Hipp* are properly distinguishable on their particular facts, we indicate for purposes of appeal that we believe any broader construction of those cases is inconsistent with *Fischer* and the other cases upon which we rely and therefore should not be followed.

IV.

We therefore find and conclude that the taxpayers have failed to establish that the Commissioner's decision is incorrect, in that they have failed to carry the burden of showing that the life interests were interests susceptible of valuation at the time the gifts were made.

For the reasons stated, it is

ORDERED that this memorandum opinion shall, pursuant to Rule 52 of the Rules of Civil Procedure, be considered as our findings of fact and conclusions of law. It is further

ORDERED that judgment should be entered for the defendant and the Clerk is so directed.

/s/ John W. Oliver
District Judge

Kansas City, Missouri
August 2, 1972

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1579
LERA H. STARK,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

No. 72-1580
WILLIAM P. STARK,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Western District of Missouri—Western Division

Petition for Rehearing

Appellants respectfully request a rehearing and opportunity for reargument of this cause, and submit the following grounds in support of this request:

As pointed out in appellants' brief, the refusal of the District Court to permit the valuation of the life estates of donors' grandchildren by use of the actuarial tables whose use is required by the Commissioner's regulations was based on a false premise, i.e., that Section 2503(b) of the Internal Revenue Code contained a statutory (i.e. Congressionally imposed) requirement that in order for

the $3,000.00 annual donee exclusion to be available, the gift must be "one susceptible of valuation" (A. 21). The opinion just rendered by this Court recognizes in the footnote on page 2 that this requirement was "judicially imposed" and was not imposed by Congress.

Pursuing this mistaken idea that Congress, rather than the courts, had imposed this requirement, the District Court concluded that any determination of the value of a life estate by the use of the Commissioner's actuarial tables would bypass this purported statutory requirement and defeat the assumed, but actually non-existent, Congressional intention. Thus the Court below said (A. 24):

> "We think it obvious that Congress did not authorize the Commissioner, by the promulgation of a regulation, to eliminate one of the two requirements that the parties agree that taxpayer must establish in order to be eligible to claim a gift tax exclusion. We are convinced that *Congress intended* that if proof of value of a particular gift could not be made in regard to the gift of a present, as distinguished from a future, interest, all taxpayers so situated simply would not be able to claim an exclusion. We reject the basic assumption implicit in plaintiffs' argument that all gifts of life estates are in fact susceptible of valuation." (Emphasis supplied).

The same erroneous assumption that Congress had imposed a requirement of proof inconsistent with the use of actuarial tables appears again in the following statement from the opinion (A. 27):

> "We conclude that the taxpayers in this case cannot demand that the Commissioner use a formula which the Congress did not provide. This Court may not read the regulation in a manner which would sub-

stitute the use of a formula for the *Congressionally required* proof of value." (Emphasis supplied).

Having so recognized that the whole rationale of the District Court's decision was predicated on an assumed statutory requirement which in fact did not exist, appellants submit that the next step would necessarily be for this Court to examine the entire question with a critical eye. In doing so, appellants urge this Court to determine the real Congressional intent by considering the statutes Congress has actually enacted, and especially by determining whether or not Congress did in fact authorize the Commissioner to promulgate actuarial tables to be used in determining the values of life estates. The Court is also urged to consider whether the Commissioner was justified in denying to the taxpayers herein the use of actuarial tables which he had previously unequivocally announced were to be used in valuing all life estates, even life estates in non-income-producing property. (Reg. §25.2512-5(c)).

This Court's opinion gives no intimation that this Court gave any consideration to the statutory authority for the regulation (Section 7805, I.R.C.), or the unqualified language of the regulation in requiring the use of the actuarial tables. On the contrary, in effect the opinion puts its stamp of approval on the opinion of the District Court, including its error in relying on a non-existent statutory provision, saying:

> "The district court opinion recites the facts in detail and demonstrates the correctness of the government's position in this case. We, therefore, affirm on the basis of that opinion."

At the very least, it would seem that this Court should have disclaimed any approval of the erroneous assumption of the court below that Congress had imposed by statute

a requirement inconsistent with the use of actuarial tables in the valuation of life estates.

This Court's opinion overlooks and totally disregards basic legal propositions urged by appellants which should be determinative of this case, not even mentioning them or explaining why they are rejected.

The first of these propositions is that, in enacting the gift tax law, Congress followed a policy of broad generalization, leaving to the Commissioner the power and duty to fill in the details of the law's administration by appropriate regulations such as those prescribing the use of actuarial tables. In support of this proposition, appellants quoted the comments of Randolph E. Paul, perhaps the most outstanding commentator on the Internal Revenue Code (Appellants' brief, pp. 12, 13), and pointed out that Section 2512 of the Code devoted a mere seven lines of generalized text to the entire matter of valuation of all types of gifts, while the Commissioner's regulations, extending to at least ten pages of small type, comprehensively prescribe the methods by which these valuations are to be determined (Appellants' brief, p. 12). Appellants further pointed out that in Section 7805 of the Internal Revenue Code, Congress had specifically delegated to the Secretary of the Treasury the power to issue "all needful regulations" for the enforcement of the law, and that Reg. §25.2512-5(c) requiring the use of actuarial tables in valuing life estates was issued pursuant to this Congressionally delegated authority. This Court's opinion gives no indication that this crucial point of appellants' argument was heard or considered.

The second proposition urged by appellants was that pursuant to this statutory authority the Commissioner did in fact issue Reg. §25.2512-5 which states in unequivocal

language how all life estates are to be valued, and that such valuation is to be made by use of actuarial tables. The regulation announces a single rule applying equally to the Commissioner and the taxpayer. Surely appellants may properly request this Court to examine the language of this regulation to determine whether or not it does in fact require that in all instances true life estates be so valued by use of the actuarial tables. This Court's opinion gives no evidence that the Court did in fact examine this regulation to see whether or not its language is definite and peremptory in requiring that life estates be so valued. If appellants are mistaken in so reading the regulation, it would seem that this Court would point out their mistake by indicating wherein the regulation states that it is to be used only when the Commissioner wishes to use it or when its use will increase the revenue, or where it states that any use by the taxpayer is permitted only as an act of grace. The opinion gives no evidence that the Court found in the regulation any such limitation as to its use.

The next argument urged by appellants was that, assuming that the Court did in fact examine the language of Reg. §25.2512-5 and find that its language unequivocally required the present value of a life estate to be determined by the use of the Commissioner's actuarial tables, then, as was pointed out on pages 17 to 19 of appellants' brief and pages 34 to 36 of the addendum, such regulations having been in force in substantially the same form since 1936, they would be presumed to have Congressional approval and to have acquired the force and effect of law. This Court's opinion seems to indicate that this argument was completely overlooked.

The final argument of appellants, which surely was entitled to be considered by this Court, was that if the gifts

made by taxpayers in this case had consisted solely of the life estates of their grandchildren, such life estates would certainly be taxable for gift tax purposes. In determining the life estates' taxable values, Reg. §25.2512-5(c) specifically requires that their valuation be determined by use of the actuarial tables, and in fact the Internal Revenue Service would have so determined such values, imposing a tax based on such actuarial values. The fact that values of the life estates can be ascertained by use of actuarial tables in imposing the tax on such a gift shows the fallacy of the finding that the life estates here in question "had no ascertainable value" as stated in page 3 of the opinion of this Court.

How can this Court give its stamp of approval to a proposition that a life estate which had an ascertainable value which could be taxed, really "had no ascertainable value" as stated in this Court's opinion?

The government has misled this Court by citing, as controlling, certain decisions which reject the use of actuarial tables but are not actually in point. Generally speaking, the purported life estates or terms for years in these decisions were subject to some contingency which might destroy or terminate them, or which were actually shams. These contingent estates are not to be compared to the life estates in the case at bar, which it must be conceded are true life estates; and which, regardless of the amount of income they may produce at any given time, will last throughout the lifetimes of the young donees who will survive both the donor and the trustee.

Remembering that Reg. §25.2512-5(c) requires the valuation by actuarial tables even of "the right of a person for his life . . . to use nonincome-producing property", it seems obvious that rejection of the use of actuarial tables by an examination of income actually produced at a specific

time is inconsistent with the terms of the regulation which, as above pointed out, has been promulgated by statutory authority, has been in effect over a long period of years, and has acquired the force and effect of law.

This Court should not hold that an interest which, by use of actuarial tables, can be valued for purposes of taxation by the Commissioner, has no value ascertainable by use of such actuarial tables when such valuation would benefit the taxpayer. Instead this Court should join with the Fourth Circuit in its decision in *Rosen* v. *Commissioner*, by holding that a taxpayer who makes a gift can safely rely on the regulations which, by statutory authority, the Commissioner has promulgated for his guidance; and by holding that, having made the gift and presumably incurred a definite gift tax liability, the taxpayer will not later be subjected to a greater tax because of investment decisions of the trustee which, in the opinion of the Commissioner, produce less income than might have been anticipated at the time of the gift.

Appellants urge that the cause of justice and the orderly administration of the gift tax laws will be served by a reexamination of the Court's opinion and decision in this case and the granting of a rehearing on the issues presented.

Respectfully submitted,

Elmer B. Hodges
John I. Wassberg
1000 Bryant Building
Kansas City, Missouri 64106
Attorneys for Appellants

Gage, Tucker, Hodges, Kreamer,
Kelly & Varner
1000 Bryant Building
Kansas City, Missouri 64106
Of Counsel

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel, by mailing four copies thereof on this ..... day of April, 1973, in an envelope, with postage prepaid, properly addressed to him as follows:

Scott P. Crampton, Esq.
Assistant Attorney General
Tax Division
Department of Justice
Washington, D.C. 20530

Elmer B. Hodges
Counsel for Appellants

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1972

No. 72-1579.
Lera H. Stark,
Appellant,

vs.

United States of America,
Appellee.

No. 72-1580.
William P. Stark,
Appellant,

vs.

United States of America,
Appellee.

Appeals from the United States
District Court for the
Western District of Missouri.

Petition of appellants for rehearing filed in these causes having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

May 9, 1973

LIBRARY
SUPREME COURT, U
EP 20

No. 73-226

In the Supreme Court of the United States

OCTOBER TERM, 1973

WILLIAM P. STARK AND LERA H. STARK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-226

WILLIAM P. STARK AND LERA H. STARK,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this gift tax case, petitioners made gifts of stock of their closely held corporation to three trusts, one for the benefit of each of their three minor grandchildren. Each trust instrument provided that the beneficiary was to receive the net income from the trust until he reached the age of 30, at which time he could receive the corpus. Under Section 2503(b) of the Internal Revenue Code of 1954, a donor can exclude $3,000 from each gift to any person from the total taxable gifts made during the year. There are two requirements for application of the exclusion. First, under the terms of the statute such gifts must be "other than gifts of future interests in property." Second, since the statutory exclusion is for the first $3,000 of each gift, the ex-

clusion is applicable only to gifts having an ascertainable value.[1]

Petitioners acknowledged in the courts below (Pet. A2) that the gifts of corpus to each trust were future interests and ineligible for the $3,000 exclusion. However, they contend that they are entitled to the exclusion for the gift of income to each beneficiary. Without reaching the question whether the gifts of income were present or future interests, both courts below denied the exclusion on the ground that the income interests had no ascertainable value.

1. Based on the evidence, which demonstrated that it was improbable that the corporation would pay any dividends, the courts below held that the income interests had no ascertainable value. No dividends had been declared during the prior thirteen years (Pet. A7). According to the testimony of petitioner's son, who was president of the corporation and trustee of the trusts, the corporation was so "strapped for working capital" that it would be a hardship for it to pay dividends in the foreseeable future (R. 32, 36).[2] Although the trustee had the power to sell the stock and reinvest the proceeds (R. 14-15), the stock was not publicly traded nor had it ever been offered for sale to the public (Pet. A7). It was therefore improbable that it could be sold by the trustee and the proceeds reinvested in income producing assets.

---

[1] *Van Den Wymelenberg* v. *United States*, 397 F. 2d 443 (C.A. 7), certiorari denied, 393 U.S. 953; *Fischer* v. *Commissioner*, 288 F. 2d 574 (C.A. 3); *Funkhouser's Trusts* v. *Commissioner*, 275 F. 2d 245 (C.A. 4), certiorari denied, 363 U.S. 804; *LaFortune* v. *Commissioner*, 263 F. 2d 186 (C.A. 10); *Herrmann's Estate* v. *Commissioner*, 235 F. 2d 440 (C.A. 5); *Commissioner* v. *Brandegee*, 123 F. 2d 58 (C.A. 1).

[2] "R." references are to the record appendix in the court of appeals.

Under these circumstances, the courts below properly rejected petitioner's contention, renewed here (Pet. 9-12), that notwithstanding the absence of any evidence of an ascertainable value, the value of the income interest should be computed in accordance with the valuation tables for life interests provided by Section 25.2512-5(c) of the Treasury Regulations on Gift Tax (1954 Code). These tables assume an annual income yield of 3½ percent on the value of the donated property at the time of the gift. However, in order to insure that the use of the tables will not result in an unrealistic or unreasonable valuation, the rule is that the tables be used only where the property interest is likely to yield income. *Morgan* v. *Commissioner,* 42 T.C. 1080, 1088, affirmed *per curiam,* 353 F. 2d 209 (C.A. 4); *Commissioner* v. *Maresi,* 156 F. 2d 929 (C.A. 2); *Hanley* v. *United States,* 63 F. Supp. 73 (Ct. Cl.); *Carl E. Weller* v. *Commissioner,* 38 T.C. 790, 803. In view of the exceedingly small likelihood that any income would be payable to the trust beneficiaries in the foreseeable future, it would have been unrealistic to assume the annual income rate of 3 1/2 percent upon which the tables are based.

2. Petitioners' assertions (Pet. 9-10, 12-13) of a conflict of decisions are without merit. Both *Simpson* v. *United States,* 252 U.S. 547 and *Ithaca Trust Co.* v. *United States,* 279 U.S. 151 involved the use of the valuation tables to value life estates where the continued production of income could be safely assumed. Moreover, while the Fourth Circuit in *Rosen* v. *Commissioner,* 397 F. 2d 245, justified the taxpayer's use of the tables in valuing the gift of the income interest of non-income producing stock, the critical ground of the decision was that the "shares appear[ed] to be freely marketable" because "the stock [was] held publicly and * * * listed on the American Stock Exchange." (397 F. 2d at 248).

On these facts, the court in *Rosen* held the trustees' power to sell the stock and reinvest the proceeds in income producing property not to be "truly illusory." Cf. *Morgan* v. *Commissioner, supra.* Given the lack of free marketability of the stock in this case, there was no basis for a similar assumption of conversion by the trustee to income producing property which might justify the use of the valuation tables.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

SUPREME COURT, U. S.

OCT 1 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-226

WILLIAM P. STARK and LERA H. STARK,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

ELMER B. HODGES
RICHARD H. BROWN
1000 Bryant Building
1102 Grand Avenue
Kansas City, Missouri 64106
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-226

WILLIAM P. STARK and LERA H. STARK,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

I. The government's brief in opposition to the granting of the writ attempts to distinguish the decision of the Fourth Circuit in *Rosen* v. *Commissioner*, 397 F.2d 245 by saying (M.3)

> "The critical ground of the decision was that the 'shares appear(ed) to be freely marketable' because 'the stock (was) held publicly and * * * listed on the American Stock Exchange.'"[1]

1. It may be noted that the memorandum misquotes the *Rosen* decision, the memorandum quoting the decision as though the Court was referring to the condition in 1961 at the time of the gift whereas the Court actually spoke in the present tense as of the time of the decision in 1968 as follows:

> "On the contrary, Gulf American shares appear... to be freely marketable—the stock *is* held publicly and *is* listed on the American Stock Exchange."

This attempted distinction ignores a presumption of marketability which applies equally to both the *Rosen* case and the case at bar. The tax is imposed and the right to the exclusion determined at the very moment of the gift. The valuation regulations assume that all property is marketable, the tax being based on its fair market value.

Both the shares of stock of W. P. Stark Lumber Company, Inc. in the present case and the Gulf American in the *Rosen* case were required to be valued under Reg. §25.2512-1 which assumes ready marketability at the value which is taxed, as follows:

> "The value of the property is the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell, and both having reasonable knowledge of relevant facts. Thus the value is generally to be determined by ascertaining as a basis the fair market value at the time of the gift of each unit of the property."

The two cases cannot be distinguished on the ground of relative marketability of the gift property. The conflict between the *Rosen* decision and the case at bar is that in *Rosen* a life estate in temporarily nonincome-producing property was valued and the statutory gift tax exclusions allowed, while in the case at bar under substantially identical circumstances the exclusions were denied.

II. In *Continental Illinois Nat'l Bank & Tr. Co. of Chicago* v. *U. S.*, 32 AFTR 2d ¶ 147,849, a case decided favorably to the taxpayers (and in agreement with petitioners here) on June 12, 1973, not previously cited by petitioners or the government, the District Court for the Northern District of Illinois (E.D.) approved use of tables for valuing a life estate and disregard of extrinsic evidence

of the life tenant's health, on the ground that use of the tables is required in order to eliminate uncertainty and speculation. The Court also emphatically endorsed the reasoning and conclusions of *Merchants National Bank of Topeka* v. *U. S.*, 32 AFTR 2d ¶ 147,825, cited on page 11 of the petition for writ herein.

Unless this Court issues its writ in this case, approval will have been given to an arbitrary action whereby the executive branch of the government will be permitted to insist that taxpayers follow long standing rules which the government, however, may with impunity elect to ignore or reject. Review by this Court is essential to avoid introduction of confusion and uncertainty into gift and estate tax valuation cases. Petitioners respectfully urge that their petition be granted.

ELMER B. HODGES
RICHARD H. BROWN
Attorneys for Petitioners

September, 1973